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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

I

ARGUMENT

I. RESPONDENT HAS REPHRASED THE ISSUES AND FAILED TO SUPPORT THE JUDGMENT BELOW.

A. THE DOCTRINE OF "CONSENT" WAS THE BASIS OF THE AFFIRMANCE OF THE DISTRICT COURT JUDGMENT, NOT THE VALIDITY OF UNION'S CONSIGNMENT SCHEME.

1. The Issues of the Instant Appeal Involve Unlawful Means and Methods, and the Use of Consignment to Regiment the Judgments of Independent Retailers.

Respondent has attempted to rephrase the issues of the instant appeal under its heading, Questions Presented (Respondent's Brief, pp. 2-4). The issues in the instant case, however, do not involve the legality of consignment in the abstract. The issues rather concern Union's particular consignment agreement; the purpose with which it was promulgated and used;

the use of the agreement to prevent competition as to prices among all the dealers; the effect of the consignment system in establishing uniform and non competitive prices based on what Union's competitors were charging the public; the means used to police the consignment prices; and the use of the consignment system to regiment and oppress independent dealers.

The respondent can fare no better under "consignment" than can a supplier with a suggested price policy. The antitrust laws have not been held to invalidate a single supplier's suggestion of resale prices as an announcement to the trade, but when the supplier utilizes means and methods which compel dealer obedience to price orders it violates the Sherman Act. "Consignment" can not be used as the obvious means of compelling uniform and non-competitive prices among those in business for their own risk. *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. 1963 Trade Reg. Rep., Para. 16,422. Consignment does not prevent judicial inquiry to determine if it is being utilized as an instrument of oppression.

Respondent can not point to a voluntary cooperative acceptance of its retail price fixing consignment agreement but determined to rely on unlawful tie-in. Union Oil determined not to allow the dealer freedom to renounce consignment. Instead it conditioned lease occupancy and continuance of the dealer's business on the acceptance of the respondent's price orders and gasoline deliveries under its consignment agreement (R. 277-278). It threatened dealers with such loss if price orders were not obeyed (Answer, para.

17, R. 93). Thus the record shows the regimentation of otherwise free and independent retailers by Union by means and methods held coercive. *United States v. Richfield Oil Company*, 343 U.S. 922 (1952), affirming per curiam, 99 F. Supp. 280 (1951). The opinion of the United States Court of Appeals for the Ninth Circuit, of course, does not support the use of such means by a powerful gasoline company, and assumed that Union was in violation of the Sherman Act. It relied, rather, on the tort doctrine of "consent". The respondent does not support this affirmative defense, but seeks to sustain the judgment on other grounds.

It is respectfully urged that the doctrine of "consent" is inapplicable here and that there are no legal bars to petitioner's action for damages based on the destruction of petitioner's business by respondent because he refused to obey price orders.

II. THE ARGUMENT OF RESPONDENT DOES NOT MEET THE ISSUES AND FACTS OF THE CASE.

A. SUMMARY JUDGMENT CANNOT BE SUSTAINED FOR THE RESPONDENT.

1. The Record Shows That Respondent's Consignment System Was Used to Enforce Uniform and Non-Competitive Prices in Interstate Commerce Among Independent and Competitive Dealers Whose Free Exercise of Business Judgments Was Subject to Coercive Tie-in, Threats of Non-Renewal of a One Year Lease, and Non-Renewal of the One Year Lease Because of the Non-Acceptance of Price Control; That Petitioner's Lease Was Not Renewed Because He Set Prices at Market Level Against the Threats of Respondent.

Petitioner shall attempt to reply to the points raised by respondent, as set forth in its Summary of the Argument, Respondent's Brief, pp. 24-31.

The instant appeal stems from the view of the district court below that the case was one which should be decided by the appellate courts based on the concessions of the respondent (R. 413; 426-427; 435). Firstly, the parties were urged to arrive at an agreed statement (R. 377-378). Then, the court urged that the plaintiff file a pre-trial statement, upon which the defendant could admit the facts and a review obtained (R. 399). Respondent turned its back on this procedure and instead noticed the deposition of the plaintiff (R. 452). Respondent then moved for summary judgment (R. 298), and during the hearing, the district court was of the view that plaintiff should file a motion for partial summary judgment on the issue of liability and that the appellate courts should decide the issues of law involved (R. 413; 426-427). It was expressly stated that the plaintiff in filing his motion for partial summary judgment could make use of every contention and use the full record (R. 435).

Thus, the first point of respondent's argument, the ripeness of the case for summary judgment (Respondent's Brief, p. 24), that plaintiff has gambled on an all or nothing basis, is in error. Petitioner made a motion for partial summary judgment on the issue of liability under the direction of the district court without waiving his right to a trial by jury (R. 337-338).

Petitioner has, however, urged at all times that the stipulations of the defendant created liability as a matter of law under the *per se* doctrine. Price fixing arrangements, both vertical and horizontal, are *per se* illegal. *White Motor Co. v. United States*, 372 U.S.

253, 260 (1963). The stipulations were made by counsel for respondent because he knew that there were no alternatives available to him; the respondent did business in the manner stipulated. Thus each stipulation is corroborated by documentary evidence.

1. Purpose of the consignment program was to fix prices.	R. 223-224; 231-232, 233, 247-248.
2. Illegal tie-in.	R. 276-277; 277-278.
3. Threats of lease non-renewal.	Answer, R. 93, para. 17, and see R. 277-278, 77-78.
4. Respondent would only issue the one year lease.	R. 213-214; R. 277-278.
5. Non-renewal because of dealer's setting price of own judgment.	Answer, para. 18, R. 93. Consignment changes; R. 77-78; 286. Policing prices; R. 247-248. ". . . we will have to review every dealer that has not agreed to go along on our consignment basis to determine what action we need to take, even to the point of deciding that we should lose the business" (R. 277-278).

It is respectfully urged that these are ultimate facts which create liability under the Sherman Act's prohibition against vertical price fixing by coercion.

It is noted that respondent still continues to insist that it may use the renewal of a one-year lease as a club to perpetuate price control.

Respondent's Brief states, at page 76:

> "Simpson's other point of attack is the supposition—also stipulated as a fact for the purposes of Union's motion—that Union would not give a

new lease to one who had violated a consignment agreement, i.e., to one who, after obtaining gasoline from Union to handle as its agent, violated his instructions."

But even if there are issues of fact to be tried on liability, plaintiff below is entitled to a trial by jury. *F. H. McGraw & Co. v. New England Foundation Co.* (1st Cir., 1954) 210 F.2d 62; *Wallin v. Richmond Screw Anchor Co.* (2nd Cir., 1946) 154 F.2d 780; *Garrett Biblical Institute v. American University,* (D.C. Cir., 1947) 163 F.2d 265; *Lloyd v. Franklin Life Insurance Company* (9th Cir., 1957) 245 F.2d 896; *Brawner v. Pearl Assurance Company* (9th Cir., 1959) 267 F. 2d 45.

B. THE FOURTH CIRCUIT, UPON THE SECOND APPEAL IN OSBORN v. SINCLAIR REFINING COMPANY, HAS HELD THAT MAJOR GASOLINE COMPANIES ARE LIABLE FOR DAMAGES WHEN LEASES OF DEALERS ARE CANCELLED (ALTHOUGH CANCELLED PURSUANT TO THE TERMS OF THE LEASE) IN THE ENFORCEMENT OF A COERCIVE PROGRAM WHICH RESTRAINS TRADE.

1. The Arguments Advanced by Union to This Court Were Rejected by the Fourth Circuit.

It is respectfully urged that the recent opinion of the United States Court of Appeals for the Fourth Circuit, *Osborn v. Sinclair Refining Co.,* decided November 4, 1963 ..... F.2d ....., C.C.H. 1963 Trade Cases, Para. 70,940; BNA Antitrust and Trade Regulation Report, No. 122, November 12, 1963, completely rejects the contentions of the respondent in this appeal. The learned court in *Osborn* held that a service sta-

tion dealer whose lease has been terminated because he did not follow the orders of his lessor and supplier which were made pursuant to an unlawful tie-in program had been injured and that he was entitled to damages under the Clayton Act to compensate him for the loss of his service station business.

As to the district court's ruling that the dealer was not entitled to damages arising from the cancellation of a year to year lease, the court of appeals stated, pp. 78,746-78,747:

> "There is no justification in antitrust law or in the general law of damages in limiting recovery to losses sustained before the break in business relations. Where the customer is cut off in a coercive attempt to further a forbidden arrangement for a 'fenced off market,' Northern Pac. R. Co. v. United States, 356 U.S. 1, 11, 12 (1958), he is entitled to recover all damages issuing from that punitive action. To deny him this would eviscerate section 4."

The *Osborn* opinion held that the *Colgate* doctrine did not sanction the termination of business relations in order to pressure a supplier's dealers to adhere to an unlawful program and that *Colgate* could not be used to prevent recovery of damages to a dealer subjected to such pressure.

The court stated, p. 78,747:

> "There is no indication in *Parke, Davis*, or in any other case, that these principles regarding refusals to deal vary, depending upon whether there is a monopoly or concerted action with co-

conspirators, or whether, on the other hand, there exists some other form of arrangement in restraint of trade. To the contrary, irrespective of monopoly or conspiracy, if the seller pressures his customers or dealers into adhering to resale price maintenance, or exclusive dealing or tie-ins, he has put together an unlawful arrangement and taken himself outside the narrow protection afforded by *Colgate.*"

In holding that a right to cancel a lease for lawful purposes was not a shield to liability when used by a single supplier to further arrangements in restraint of trade, the court stated, p. 78,748:

". . . On the other hand, no case has been cited to us, and our research has revealed none, holding that a refusal to deal may be immune in spite of the fact that the seller has violated the antitrust laws and that the refusal to deal was in furtherance of that violation. The cases are unanimously to the contrary. They show without exception that damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws, whatever form of trade restraint the arrangement takes. Although most, but not all, of these cases did in fact involve monopoly or conspiracy, as opposed to non-monopolistic or non-conspiratorial arrangements in restraint of trade, the courts made absolutely nothing of such distinction."

It is respectfully submitted that Union Oil can fare no better than did Sinclair under the respondent's claims of "consignment", "public utility regulation",

"no conspiracy",[1] and the fixing of lease terms by the courts. The Sherman Act subjects producers to liability when it uses means that go beyond a simple announcement of policy and disinclination to sell in order to secure adherence to a price maintenance scheme. *Osborn v. Sinclair Refining Co.*, supra, at p. 78,744; *United States v. Richfield Oil Co.*, supra; *Federal Trade Commission v. Atlantic Refining Co.*, supra.

C. THE RESPONDENT HAS AVOIDED THE TEACHINGS OF THE MASONITE CASE.

1. The Sherman Act Is Concerned With the Purpose and Effect of Consignment Schemes.

The respondent's next contention, that its price fixing scheme is saved because it uses consignment, fails to discuss the *Masonite* case. But this Court made it abundantly clear in *Masonite* that the *General Electric* case was not a holding that agency devices could be used to hide price fixing schemes. This Court there stated, 316 U.S. 265, at 280:

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[1]Respondent, however, cannot claim that "conspiracy" was not made an alternative theory of liability by petitioner. At R. 419-420, petitioner's counsel made clear that the record justified the finding that Union Oil Company "was compelling a combination in restraint of trade among the dealers and itself." Counsel then filed his Motion for Partial Summary Judgment, predicating liability on alternative theories, including the finding of conspiracy. See R. 339, 340, 343. The district court acknowledged this, at R. 350. But compare with R. 354. After the filing of the district court's opinion, petitioner filed "Plaintiff's Objections to Entry of Judgment in Summary Judgment Proceedings", R. 361. The failure of the court to find "conspiracy" or to permit further proof thereof was urged as error (R. 363-364).

> "So far as the Sherman Act is concerned the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."

The citation to *United States v. Standard Oil Company*, C.C.H. 1959 Trade Cases, Para. 69,399, is not relevant. This consent judgment purports to be judgment which has not adjudicated the practices alleged to be unlawful in the complaint. It involved a horizontal conspiracy to monopolize by the respondent Union Oil Company of California and six other major integrated oil companies. These companies were alleged to have conspired to monopolize the marketing of refined petroleum products in the Pacific States Area (California, Oregon, Washington, Nevada and Arizona). (C.C.H. The Federal Antitrust Laws, With Summary of Cases Instituted By the U. S., 1890-1951, No. 1024, p. 398.)

An injunction which is based on a consent settlement cannot become a basis to determine legality. The consent judgment did not purport to adjudicate facts, let alone questions of law arising from the activities of the individual participants to that conspiracy to monopolize after the date the government's complaint was filed. The United States indeed took pains to allow it to attack the activities of the individual defendants. See Paragraph XVI (B), Final Judgment, 1959 Trade Cases, Para. 69,399 at p. 75,534.

D. UNION'S CONSIGNMENT AGREEMENT HAS FAILED TO FOLLOW THE STANDARDS OF THE GENERAL ELECTRIC CASE.

1. The Dealer Assumed Risks of Price Decline.

Respondent next urges that *General Electric* case supports its consignment agreement. The Respondent's Brief, however, admits the sham nature of the consignment agreement itself. It states that a test of purchase and sale is, at p. 53:

> "A purchaser is liable for the agreed purchase price, which is determined at the date of the delivery of the goods to him, and he remains liable even though its value falls before he sells it."

But under respondent's scheme, the retail dealer shouldered the burden of price decline in the same manner as did the purchase and sale dealer. This was the admitted intent and purpose of the respondent. (R. 72).

This letter of April 15, 1958, in referring to "amount of dealer margins" manifestly refers to a purchase and sale "margin". Thus, in order to equate the consignment commission with a purchase and sale margin, the respondent simply did away with guaranteed commissions. The Union dealer absorbed the decline in price as would a purchase and sale "margin" dealer. As the retail price declined, so did his margin, just as in a purchase and sale transaction. (R. 82-85) If retail prices went up, his margin was increased.

Further, there was no guarantee, at any time, of a commission for handling and storage apart from sales of gasoline. The dealer would receive nothing if he did not sell Union's gasoline. Thus when petitioner was ordered to raise his price 2¢ over market prices, he was being ordered to lose income, although his handling and storage burdens were the same regardless of sale. The loss of gallonage sale meant the loss of income. But gasoline and TBAs were his major source of income. Unlike the ordinary hardware store retailer acquiring General Electric bulbs on consignment, he did not have many other products to dispense. But Union did not assume the risks of price decline. Until March 1, 1958 Union determined that the dealer absorb 50% of the decline in retail prices (subject to a guaranteed commission, which in turn was based on gasoline sales (R. 100). After March 1, 1958 the respondent's dealers were to be required to absorb price declines between deliveries of gasolines without guaranteed commissions (R. 281, 284, 76, 81-85).

This is contrary to the *General Electric* plan wherein General Electric did not place any risk of price decline on the dealer. Indeed, the dealer could return the stock. Here the dealer's livelihood is dependent on a gallonage sold of a commodity dumped into underground tanks and not readily returnable.

Argument is made that the agreement obligated the dealer to pay for the gasoline on the basis of accounting for proceeds when received (Respondent's Brief, p. 14). But respondent did not do business in this manner. It demanded payment for gasoline when

delivered, for the delivered gasoline, not the sold gasoline. It ceased to read the meters to determine the dealer's prior sales. This is clearly stated by Mr. Rath at R. 170-171. Thus all attempts to base payment on sales were eliminated and the dealer paid for the delivered gasoline. The Federal Trade Commission has described the situation in the favor of petitioner. In *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. Trade Reg. Rep., Para. 16,422, at page 21,289:

> "A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and the sum was put into escrow. *When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.*" (Emphasis added.)

2. Union Oil Did Not Carry All Applicable Insurance.

Respondent asserts that the requirement that the dealer carry insurance to cover damage or destruction to the gasoline by others, in consistent with General Electric's plan. But in the General Electric plan the company paid whatever insurance is carried. Union, on the other hand, provided in its consignment agreement that the dealer maintain personal liability and property damage insurance (R. 97).

There is a clear distinction between provisions designed to provide for efficient handling of merchandise and provisions which require the dealer to pay for insurance or be liable for the retail price. Union expressly required the so-called agent to cover these matters at his risk (Para. 4, 5, 6; R. 96-98).

Whereas the General Electric dealer was responsible for the merchandise consigned to him, here Union required the dealer to cover all ordinary risks (Id.).

3. Other Risks of Title Were on the Dealer.

All taxes save property taxes were paid by the dealer. The risks of shrinkage or evaporation were on the dealer and Union made no effort to allow compensation for such losses to the gasoline to which it claimed title.

The statement in *Federal Trade Commission v. Atlantic Refining Co.*, supra, p. 21,289 is fully applicable here:

> "Dealers continued to operate their businesses after entering consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold at retail as before."

B. THE McGUIRE ACT IS IRRELEVANT TO THE INSTANT CASE.

It is no defense to a charge of vertical price fixing that the producer could have fair traded. This Court has made it clear that the Miller-Tydings Act and McGuire Act are exceptions to the Supreme Court's prohibitions against resale price fixing and will not be construed to grant exemptions apart from following the statutory procedures. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951); *United States v. McKesson & Robbins, Inc.*, 351 U. S. 305 (1956) at 310:

> "The question before us is whether the price-fixing agreements challenged herein move along that route [the Miller-Tydings Act]. If they do not, they are illegal *per se*. There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The District Court was plainly in error in attempting to create a category of agreements which are outside the exemption of those Acts but which should nevertheless be spared from application of the *per se* rule."

But the respondent argues that even though its consignment program was resale price fixing it should be considered exempted. But under *McKesson & Robbins*, this argument is invalid and unsupportable. The Answer of respondent attempts to claim Miller-Tydings only prior to May, 1955, not thereafter. (Para. 11, R. 91). Thus the Miller-Tydings Act was not an issue and could not become one.

But even assuming not, the consignment scheme here cannot possibly be said to be "fair trade". The scheme of respondent went interstate into states that have held the non-signer clause unconstitutional. Washington: *Remington Arms Co. v. Skaggs, et al.*, 55 Wash. 2d 1, 345 P. 2d 1085; Oregon: *General Electric Co. v. Wahle*, 207 Or. 302, 296 P. 2d 635. In Utah, the Fair Trade Act was held unconstitutional. *General Electric Co. v. Thrifty Sales, Inc.*, 5 Utah 2d 326, 301 P. 2d 741. Further, some of the states provide for minimum price fixing only. Montana, Revised Codes, 1947, Title 85, Chap. 2, Sec. 85-202; Oregon, Revised Statutes, Title 50, Chap. 646, Sec. 646.340. The federal courts will not support an unlawful interstate scheme.

Respondent could not in California "fair trade" under the consignment scheme here because: (1) Not one dealer knew of fair trading; a prerequisite to state sanction;[2] (2) No single uniform price was made applicable to all dealers in the trade (R. 251, 256, 257, 277, 282, 283, 74-77); (3) Union controlled prices of lessee dealers who were in competition with purchase and sale Union dealers not under consign-

[2]See the recent opinion of the United States Court of Appeals for the Ninth Circuit, *Amedio Girardi v. The Gates Rubber Company Sales Division, Inc.*, decided November 21, 1963, ___ F. 2d ___; slip opinion, p. 13, footnote 11:

"No contention is made that Gates is protected under the minimum resale price proviso of § 1 of the Sherman Act because of the California Fair Trade Act (California Business and Professions Code, §§ 16900-16905). Such contention could not be made for there is no allegation or proof that Gates had any minimum price agreement of the kind there referred to. . . ."

ment (R. 333); (4) Union controlled the prices of lessee dealers in competition with off-brand dealers who had been supplied Union gasoline in large quantities by Union (R. 334-336), and (5) Union controlled the prices of lessee dealers in competition with stations operated or controlled by Union itself (R. 447, 333). These facts would preclude any statutory exemption. *United States v. McKesson & Robbins, Inc.*, supra.

The "uniform" price referred to by petitioner in his opening brief was "uniform" from respondent's view, not the view of a fair trade law. Thus Union follows the retail prices of Standard Stations, Inc. (R. 281-284; 72-76). These Standard Oil prices may, in the market place, require Union dealers to post many different prices in a small trading area within a city (R. 231-232; 247-248). This would not be tolerated in California or any fair trade state. *Calvert Distillers Corp. v. Nussbaum Liquor Store, Inc.*, 66 Misc. 342, 2 N. Y. 2d 320 (1938).

The respondent did not intend to "fair trade", it could not "fair trade" even if it desired to, and the McGuire Act is inapplicable. Its attempted usage here is beyond authority. The assertion of "fair trade" only points out how far removed respondent's consignment scheme was from legality.

F. RESPONDENT ACQUIRED CONTROL OVER THE BUSINESSES OF 3,000 INDEPENDENT RETAILERS BY PREDATORY MEANS.

Respondent attempts to defeat the proof of violation of Section 2 of the Sherman Act, by resort to syllogism. It urges that since it could lawfully own and operate its own stations, it therefore can adopt means and methods which have the same effect as single ownership. The syllogism is absurd. It would follow under this logic that since one may have had a lawful monopoly, therefore all predatory attempts to obtain a monopoly are lawful. The fallacy is that the manner in which one obtains a monopoly is decisive for a Section 2 violation.

When a company the size and strength of Union intends to acquire control over the business judgments of independent businessmen who have invested heavily in their business ventures; and this intention is effectuated by resort to the coercive use of illegal tie-in, threats to, and the non-renewal of short term leases, fashioned for such a purpose, an attempt to monopolize occurs. *United States v. Aluminum Co. of America* (2nd Cir., 1945) 148 F. 2d 416, approved *American Tobacco Co. v. United States*, 328 U. S. 781 (1946). The violation of Section 2, occurs precisely in the resort to predatory practices of threat, coercion and use of leases as weapons to compel obedience. These means are unlawful and when used to control the judgments of 3,000 independent businessmen in 8 western states, a violation of Section 2 occurs.

G. CONSIGNMENT CONTEMPLATES EXCLUSIVE DEALING.

The contentions of the respondent denying the exclusive dealing requirements of the consignment system through its consignment agreements are strained and illogical. As was stated in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, at 354-355 (1922):

> "The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force."

The *Sinclair* case, 261 U. S. 463, is inapplicable here because Union was not leasing its pumps, it was leasing the service station. *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U. S. 293, at 303-304 (1949).

The respondent urges that petitioner has confined its claim of exclusive dealings to the sole fact that the record showed that all the Union consignee dealers in California sold only Union gasoline. While the effect of a program intended to restrain trade in gasoline products and prices is decisive, *United States v. Masonite Corporation*, supra, the respondent did not correctly state the record. Respondent's Brief

at page 20 claims to correctly quote the petitioner's counsel at R. 432, but it omits the statement:

> "Mr. Keith. *The basic facts*, as I say, you get admissions in the trial from the witness, and so on . . ." (Emphasis added)

At R. 434, petitioner's counsel made it abundantly clear that he was relying on the entire record.

Petitioner's counsel stated:

> "Mr. Keith. Well, all the papers plus that fact, I think, would raise the judicial conclusion there was such a policy."

All the papers, it is respectfully submitted, show as follows:

(a) The consignment agreement provides that the dealer maintain Union trade marks on his, the dealer's facilities (R. 95).

(b) The retail dealer consignment agreement system was a determined, comprehensive program and scheme by which Union determined to fix the prices of Union's gasoline at retail gasoline service station sites.

(c) The purpose to maintain fixed and uniform prices equal to or above Standard Stations, Inc. would be defeated by sales of other gasolines by the dealers.

(d) The lease provides that the dealer or lessee cannot make alterations or changes in the service station or any part thereof without Lessor's prior consent (Para. 6, R. 82). Respondent had told the

district court that the dealers were not free to repaint the service stations (R. 434-435).

(e) The avowed defense of respondents was that it desired to have sales of Union gasoline made by fiduciary agents who would thus be required to be loyal to Union and its products.

(f) The proven effect of the scheme showed that consignment dealers did not handle competitive lines of gasolines (R. 336-337).

The claim of "state labeling law" puts the cart before the horse. For this act only applies after a choice of product is made. Respondent made the choice for the independent lessee.

H. IT IS COERCION TO USE THE THREAT OF CANCELLATION OF A LEASE OR NON-RENEWAL OF A SHORT TERM LEASE TO DEPRIVE DEALERS OF FREEDOM OF CHOICE.

The *Richfield* case, which is a Section 1 of the Sherman Act case as well as a Section 3 of the Clayton Act case, is controlling on the matter that Union had coerced the dealers. Union could not control the dealer's free judgments as to prices and products by using the non-renewal of a one year lease. The case of *United States v. General Motors Corp.* (7th Cir., 1941) 121 F.2d 376, further, clearly taught that suppliers could not use such means to enforce price fixing orders. The instructions of the trial court in the *General Motors* case, printed in *Ford Motor Co. v. United States*, 335 U.S. 303, at 316, et seq., dis-

tinguished between exposition, persuasion, argument and coercion. As to the latter, it stated:

> "He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer."

Richfield, of course, made it abundantly plain that lease non-renewal could not support arrangements which restrain trade. To do so would constitute coercion on the dealer. See also *Federal Trade Commission v. Atlantic Refining Co.*, C.C.H. Trade Reg. Rep., Para. 16,422, p. 21,286; *Osborn v. Sinclair Refining Co.*, supra.

I. THERE WAS ILLEGAL TIE-IN.

It is clear that the consignment agreement related first to gasoline delivered by Union, and that it then fixed the prices of this gasoline that the dealer would charge to the public. Union's price fixing arrangements, then, related to a product, gasoline, and to the supplying of the product to the dealer by Union. The conjunction of the lease and the retail dealer consignment agreement constituted unlawful tie-in. *United States v. Richfield Oil Corp.*, supra; and *Osborn v. Sinclair Refining Co.*, supra.

J. SIMPSON SUFFERED ACTIONABLE DAMAGES.

1. Simpson Was Coerced Under the Threat of Lease Nonrenewal Into Following Prices While a Dealer.

The respondent urges that it did not compel Simpson to charge authorized prices. This, however, ignores the record of the means and methods used by it to enforce authorized prices. The discussion of respondent, then, ignores the record of coercion, and the teachings in the *Richfield* and *Osborn* cases.

2. The Colgate Case Does Not Permit a Supplier to Escape Liability for Refusing to Renew or Cancelling the Leases of Those Who Refuse to Abide by Orders Made Pursuant to an Unlawful Arrangement.

The cases cited by respondent to support its claim that no actionable damages can be claimed by petitioner stemming from the loss of his business, do not support the proposition.[3] The issue is not whether an agreement exists between the parties, but whether respondent used the threat of and the nonrenewal

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[3]Reference is also made by respondent to the judgment for unlawful detainer in the Superior Court of the State of California. Again, this reference is immaterial to this action under the federal antitrust laws. The action for unlawful detainer was occasioned by Simpson's staying on under the provisions of the temporary restraining order of the United States District Court for the Northern District of California in San Francisco (R. 547). Plaintiff had left the station on June 5, 1958 (R. 321). Thus on June 17, 1958 a default judgment was entered. It is entirely inaccurate to claim *res judicata*. A default judgment is not conclusive, in a subsequent suit on a different cause of action, against any defenses the defendant may have, since there was no trial or hearing, and it cannot be said that such matters were adjudicated. 29 Cal. Jur. 2d, Judgments, § 235. Of course, the federal courts have exclusive jurisdiction to hear and determine the claim of violation of the antitrust laws and award damages under Section 4 of the Clayton

of one year leases to require the abdica[redacted]ree judgments as to prices and products. Since petitioner's business was lost to him as a result of the exercise of his free judgments, and the consignment system of Union violated the Act, his right to damages is assured as a matter of judicial enforcement of the Sherman Act. The second opinion in *Osborn v. Sinclair Refining Co.*, supra, distinguishes the cases cited by respondent, and holds contrary to respondent's position. The Fourth Circuit has ruled that the acceptance of respondent's position would vitiate Section 4 of the Clayton Act. It stated, p. 78,746:

> "If a seller, who is not a monopolist and who does not act in concert with co-conspirators, nevertheless is able to coerce buyers into a combination or arrangement whereby prices are fixed, or the sale of one product is tied to the sale of another, or dealing is required to be exclusive, and if that seller could refuse to deal with buyers unwilling to adhere to the unlawful arrangement

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Act. *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942).

Restatement of Judgments, § 71, states:

"Where a court had incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter [redacted]"

Rest[redacted]udgments, § 71, comment c, states:

"T[redacted]e stated in this Section is applicable where the State court has incidentally determined a matter which the federal courts alone have jurisdiction to determine."

This is especially so in an unlawful detainer action since it is a special statutory action designed to provide for quick and drastic possession of property. 30 Cal. Jur. 2d, Landlord and Tenant, § 348. The defendant is usually unable to counterclaim or cross-complain, Id., §374. Extrinsic defenses which may be covered in another action such as fraud or coercion are not allowed, Id., § 366.

without answering for the resulting losses, the effectiveness of the section 4 treble-damage suit as an enforcement measure would be to a great extent nullified."

III. THE CONSIGNMENT PROGRAM WAS IN INTERSTATE TRADE AND COMMERCE

Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911);

United States v. Richfield Oil Company, 99 F. Supp. 280 (1951), affirmed 343 U.S. 922;

United States v. General Motors Corp. (7th Cir., 1941) 121 F.2d 376;

Federal Trade Commission v. Atlantic Refining Co., C.C.H. 1963 Trade Reg. Rep., Para. 16,422;

Federal Trade Commission v. Sun Oil Co., C.C.H. 1963 Trade Reg. Rep., Para. 16,418;

Osborn v. Sinclair Refining Co. (4th Cir., 1960) 286 F.2d 832; 207 F. Supp. 856; rev'd ___ F.2d ___; C.C.H. 1963 Trade Reg. Rep., Para. 70,940.

II

CONCLUSION

It is respectfully urged that the Court hold upon the record before it that the retail dealer consignment agreement program is void under Sections 1 and 2 of the Sherman Act, and that the cause be remanded solely on the issues of damages suffered. Or, in the alternative, that the judgment below be reversed and the case ordered to trial on all issues.

Dated, San Francisco, California,
December 13, 1963.

Respectfully submitted,

MAXWELL KEITH,
Attorney for Petitioner.

PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 87

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA

Petition of Union Oil Company of California for Rehearing

MOSES LASKY
BROBECK, PHLEGER & HARRISON,
111 Sutter Street
San Francisco 4, California
Attorney for Respondent

Of Counsel:
L. A. GIBBONS
Union Oil Center
Los Angeles 17, California

BORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

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UNION OIL COMPANY OF CALIFORNIA

Petition of Union Oil Company of California for Rehearing

Respondent Union Oil Company of California respectfully petitions for a rehearing pursuant to Rule 58 on the following grounds:

1. It is not clear from the Court's opinion whether Union's consignment arrangement is held to be illegal because the Court holds it to be not truly a consignment but instead a sale and purchase with resale price maintenance. Several portions of the opinion seem to indicate that it is the Court's view that the system is not truly consignment at all but a subterfuge, viz., (a) footnote 10, p. 10, and statements on page 7; (b) the fact that the word "consignment" is almost invariably put in quotation marks as if to question the correctness of the usage; and (c) denial that the arrangement can be called an "agency" (p. 8). But *if* this is the

basis of the decision, then we respectfully submit that *Union is entitled to a jury trial to determine whether the arrangement is truly a consignment*, as everyone called it, or a mere subterfuge; a summary judgment against Union denies Union its constitutional right to a jury trial. On the other hand, if in the Court's view some admitted fact irrefutably prevents the agreement from being a consignment, then proper guidance to those needing it calls for identification of the crucial element.

2. If the Court accepts the consignment arrangement as indeed a *true* consignment, but nevertheless holds it to be illegal, then the opinion leaves obscure what elements make the arrangement illegal. The opinion affirms that "consignments perform an important function in trade and commerce" (p. 4) and concedes that a single consignment, as of a painting or other work of art, binding the consignee to sell at a given price, is legal and enforceable (pp. 5 and 8). What, then, is the invalidating element? Is it the number of consignees? The opinion speaks of "a vast gasoline distribution system" and "many retail outlets" (p. 8). But if the illegalizing element is number of consignees, how many? Businessmen anxious to obey the law will be left in a quandary by the opinion. If it is illegal to use consignment at a large number of *retail* stations, is it legal or illegal to do so with a small number of *wholesale* distributors? Its use on the wholesale level is well nigh universal in the petroleum industry and much commoner in all industry than on the retail level. At what point of numbers of outlets where consignment is used is the line between legality and illegality crossed? And should not this be a question of fact for a jury to decide after the Court lays down some standards of factual pertinence?

3. Or is the illegalizing element the fact of "coercion". The opinion seems to read so, for it notes that the *Parke Davis* case precludes the use of coercion (p. 2), and it refers to Union's system as a "coercive 'consignment' device" (p. 9) and concludes,

"we hold only that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws" (p. 11). If the illegalizing element is coercion, then what is the fact or set of facts which the Court conceives to be "coercion"? Is it merely the supposed fact that when a prospective lessee sought to lease property from Union, Union in stating the terms upon which it would lease included the fact that it would lease only to a consignee? (R. 387). Or is some other fact or facts essential to constitute coercion? If the former, we submit that it is strange usage to denominate it "coercion" for one party to a solicited consensual arrangement to state the terms upon which he will deal. But, *either* way, whether this *mere* fact is held to constitute the coercion or something more is required, we *submit that Union is entitled to a jury trial of the issue.* If something more is required, then the existence of the *something more* has not yet been tried or determined by any fact-finding body. If mere refusal to lease to a non-consignee is coercion, then whether Union did so refuse in the case of Simpson is also a question of fact to be tried. Months after Simpson became a lessee Union's policies were still in process of formation (R. 277-8). The case was *not tried* below on a stipulated set of facts; it was not tried at all (R. 402, 404). While for the purposes of Union's own motion for summary judgment (R. 349, 396), it stipulated that it would not lease to a non-consignee, this it did on the submission that so far as *its motion* was concerned the fact was irrelevant. Union did not intend to so stipulate for any other purpose; nothing said in the pre-trial ought to be so construed; or if it should be, Union should be permitted to seek from the trial court relief from the stipulation. If the existence of the fact is relevant, then it should be tried. It is one thing to reverse a summary judgment for Union on holding its legal theory to be unsound under the "rule * * * we [the Court] announce today" (p. 12); it is quite another to direct a summary judgment of *violation* against Union on an assumption of facts that trial may negative. *Fountain v. Filson*, 336 U.S. 681.

4. If coercion constitutes the illegalizing element, does the rule announced by the Court illegalize Union's consignment arrangement with the numerous retailers who do *not* lease from it and choose consignment for the security it affords? As footnote 1 of the opinion states, there were 1327 nonlessee-retailers. The opinion gives no guidance to those needing and seeking it.

5. Union's consignment system was recognized and accepted by the Department of Justice in the 1959 Consent Decree in *United States v. Standard Oil Company of California*, 1959 Trade Cas. ¶ 69,399, p. 75,522, et seq. In the prolonged negotiations leading up to that decree the history, origin, motivations and purposes of Union's consignment arrangement were presented to the Department. On Union's motion for summary judgment in the present case this material did not come into the record. We respectfully submit that Union should be allowed on a trial of the cause to offer the same data before its consignment system can be declared illegal.

6. Apart from questions of legality of the consignment arrangement, there is the question what type of damage claimed by Simpson is the actionable damage. While the opinion states that Simpson suffered actionable damage, it leaves obscure *what* it is that constituted actionable damage, for Simpson asserted two distinctly different types of damage. One was for inability to fix his prices while he was a dealer, and the other was for refusal of Union to give him a new lease. It has long been held, in an unbroken line of cases, that, absent conspiracy or monopolization, one cannot be held in damages to another for refusal to deal with him, whatever the reason for the refusal, even though it be a failure of the latter to participate in an agreement said to be unlawful. This Court in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 468, 469 adumbrated a question about this but left the question open. Does the Court now close the question by holding that there is liability in the circumstances mentioned? If so, we respectfully submit that this question is even more impor-

tant than the question of the legality of consignment, and that the law, the bar, and business deserve an exposition of reasons for setting aside what has been accepted for so many years as elementary. This question is being presented to the Court in a different context by a petition for a Writ of Certiorari to the Ninth Circuit in *Tidewater Oil Co. v. Paul Lessig*, which will be filed concurrently with the present petition for rehearing. It would seem useful to consider the two together.

7. Moreover, if it is the Court's holding that a unilateral, non-monopolistic refusal of a lessor to renew a lease inflicts an actionable wrong under the antitrust laws on the former lessee where the motive and reason for the refusal were the failure of the lessee to adhere to resale prices, *then there is the major issue of fact* whether Union's refusal to renew Simpson's lease was his failure to observe resale prices. It is true that Union so stipulated, but it did so solely for the purposes of its own motion for summary judgment (R. 349), and at the request of the trial court that it eliminate "other strings to its bow" so as to get a clear issue on Union's motion (R. 381). Union did not intend to so stipulate and did not stipulate for any other purpose. We submit that, *if the fact is relevant, then the whole issue should be returned to a jury.*

8. The Court's opinion concludes with the statement,

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

But this leaves unstated who is to determine the existence of the "equities". Is it to be the jury on a trial of this case? Or, since determination of equities is normally not within the province of juries, is it to be the trial judge? Or must the case return to this Court for determination of the equities? If it is to be returned to this Court, then we respectfully submit that the equities should

be determined now unless their determination rests upon facts not before the Court. If the equities limiting recovery of damages prospectively lie in the fact that until this Court's decision consignment was universally recognized as legal under the *General Electric* case, then the issue can now be decided. But if other facts are pertinent, we respectfully submit that the Court's opinion should give guidance as to what facts the parties and the trial court are to examine in order to enable a court to determine the existence of the equities.

9. Union's consignment system is confined to its *branded, trademarked* gasoline. The Court's opinion (p. 11) distinguishes *United States v. General Electric*, 272 U.S. 476 on the basis that its *ratio decidendi* is shown on p. 485 to be the patent laws. The discussion at page 485 was in answer to a contention that there the consignment system was monopolistic. The Court rejected this as irrelevant because a patentee's monopoly of the patented article is legal. But this Court has also said that the power "manufacturers have over their own trademarked products is not the power that makes an illegal monopoly", *United States v. Du Pont & Co.*, 351 U.S. 377, 393. Or if patents are relevant to the question, Union is entitled to a trial to show that patents are involved in its gasoline.

For the reasons stated above, we respectfully submit that a rehearing should be granted.

Dated: May 8, 1964.

MOSES LASKY
Attorney for Respondent

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MOSES LASKY